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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JOSEPH J. REY, SR.
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

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ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as interpreted in Abney v. United States, 431 U.S. 651 (1977); and Burks v. United States, 437 U.S. 1 (1978), allow a defendant to appeal the question of the sufficiency of the evidence before being retried?

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REPORTED OPINIONS

The only reported opinion in this case is that of the Court of Appeals which is styled United States v. Rey, 461 F.2d 222 (1981).

JURISDICTION

The opinion by the Court of Appeals was filed on March 30, 1981, and the Court of Appeals denied rehearing on May 4, 1981. This Court has jurisdiction to grant its writ of certiorari under §3772 of Title 18, United States Code, and under Rule 20.1 of the Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

Section 1291 of Title 28, United States Code, provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

STATEMENT OF THE CASE

Petitioner, a 60-year-old attorney, was indicted for conspiring to possess with the intent to distribute heroin in violation of §§841 and 846 of Title 21, United States Code (Count 1). Petitioner was also charged with using a telephone to facilitate the commission of a felony in violation of §843(b) of Title 21, United States Code (Counts 2-5).

Viewing the evidence at trial in a light most favorable to the Government, it showed that a Government informant, under direction of the Government, offered to sell heroin to the Petitioner. The Government actually delivered a small sample of heroin to a codefendant, then later, without Petitioner's knowledge, a larger amount of a counterfeit substance to the same codefendant.

Petitioner proceeded to trial alone before a jury. He moved for a judgment of acquittal at the end of the Government's case, and the trial court granted the motion as to Count 2, one of the telephone charges. Petitioner also moved for judgment of acquittal at the close of the case. The jury found Petitioner guilty on Counts 1, 3, 4, and 5, but the trial court entered a judgment of acquittal as to Counts 4 and 5, other telephone charges. The trial court denied Petitioner's motion for judgment of acquittal as to Counts 1 and 3.

Later, on motion of the defendant and with the concurrence of the Government, the court granted Petitioner's motion for new trial based on alleged trial court errors.

Petitioner then moved to dismiss the charges and filed his plea in bar, claiming that the trial court erred in

denying the motion for judgment of acquittal as to Counts 1 and 3 and contending that retrial would constitute double jeopardy.

The trial court denied the motion to dismiss and plea in bar, and Petitioner appealed. The Court of Appeals for the Fifth Circuit essentially dismissed the appeal and remanded the case for trial, holding that one could not appeal until after sentencing. The court held that the granting of a new trial apparently deprived Petitioner of appellate review of the sufficiency of the evidence.

The district court had jurisdiction to hear this case. Under §3231 of Title 18, United States Code, the "district courts of the United States shall have original jurisdiction, exclusive of the courts of the states, of all offenses against the laws of the United

States . . . ." Petitioner was charged with violating United States laws.

REASONS FOR GRANTING THE WRIT

It is well settled that a defendant cannot be retried upon the entry of a judgment of acquittal by the trial court prior to the time the jury returns its verdict. Fong Foo v. United States, 369 U.S. 141 (1962); and Kepner v. United States, 195 U.S. 100 (1904).

In Bryan v. United States, 338 U.S. 552 (1950), this Court held that a court of appeals could remand a case for retrial on a finding that the district court should have entered a judgment of acquittal if a defendant requested a new trial as one of the remedies. The basis for the finding was that Rule 29 of the Federal Rules of Criminal Procedure was not binding on the appellate courts and that under §2106 of Title 28, United States Code, courts of appeals could order a new trial as an appropriate remedy where the accused had requested a

new trial. Then in Burks v. United States, 437 U.S. 1 (1978), this Court overruled Bryan and its progeny and held that once an appellate court found the evidence insufficient to sustain a conviction, the Double Jeopardy Clause barred a new trial even if the accused requested one. Indeed, it really does not matter that a new trial is in fact granted. Hudson v. Louisiana, 101 S.Ct. 970 (1981).

Since it is clear that there can be no retrial if an appellate court determines that a trial court erred in denying a motion for judgment of acquittal, does it not stand to reason that an appeal prior to retrial is essential in order to safeguard the rights of the accused under the Double Jeopardy Clause?

Prior to this Court's decision in Abney v. United States, 431 U.S. 651

(1977), there was some question whether, under the final judgment rule, §1291, Title 28, United States Code, courts would permit the appeal of a trial court order entered before any sentencing and judgment of conviction. It was held there that a motion to dismiss an indictment on legitimate double jeopardy grounds could constitute a final, appealable order in order to preserve some basic right of an accused. See also, Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

It was made clear by this Court in Abney that the Double Jeopardy Clause prohibited being put to trial twice. It is the double trial, not double conviction, which the clause prohibits. In effect, the court of appeals in this case stated that only upon conviction on a second trial can Petitioner obtain review of the first trial. In reviewing

the sufficiency of the evidence in the first and second trials together, and if the court of appeals agrees with Petitioner on the sufficiency question, the Court would then hold that under Burks REY should not have been tried the second time. The court of appeals is clearly saying that Petitioner must be tried twice in order to raise the double jeopardy issue. This Court has held that it is the possibility of a second trial under those circumstances which makes an appeal of the first trial possible under Abney.

This case raises significant, national questions in an area which is unsettled. Indeed, in its brief and during oral argument in the case, the Government attorney agreed that the court below should hear the sufficiency of the evidence under Abney. In a post

argument brief on this specific issue, the Government concluded:

> Accordingly, it does not appear that the manner in which the new trial is obtained will bar the right to an interlocutory appeal on double jeopardy grounds even where a new trial is occasioned by a defendant's own motion. (Supplemental Brief for the United States, p. 5)

Furthermore, there is a conflict on the issue in the circuits, as can be seen in the following decisions which have allowed such appeals. United States v. Gamble, 607 F.2d 820 (9th Cir. 1979); and United States v. Venable, 685 F.2d 71 (3rd Cir. 1978). See also, United States v. Charette, 625 F.2d 57 (5th Cir. 1980); United States v. Wright, 622 F.2d 792 (5th Cir. 1980); United States v. Garza, 603 F.2d 578 (5th Cir. 1979); United States v. Klande, 602 F.2d 108 (8th Cir. 1979); United States v. Calderon, 618 F.2d 88

(9th Cir. 1980); United States v. Brooks, 599 F.2d 943 (10th Cir. 1979); and United States v. Leonard, 593 F.2d 951 (10th Cir. 1979). Contra see, United States v. Becton, 632 F.2d 1294 (5th Cir. 1980); and United States v. Carnes, 618 F.2d 68 (9th Cir. 1980).

In fact, the issue is so confused and unsettled that there are conflicts, not only in positions taken by the Government in one case, but in the decisions within a circuit. The issue is simply too important to be left in such an unsettled and confusing state. It is an issue which arises often and will cause grave problems and hardships until settled.

CONCLUSION

For all the foregoing reasons, Petitioner urges this Court to grant its writ of certiorari in order to review this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 1981, a true copy of the foregoing Petition for Writ of Certiorari was mailed to the Solicitor General, United States Department of Justice, Washington, D.C., 20530.

RAYMOND C. CABALLERO